United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19154

UNITED STATES OF AMERICA, APPELLANT

v.

WALLACE & TIERNAN, INC., ROBERT T. CONNER,
CHARLES E. HOUGH, APPELLEES

Appeal from the United States District Court for the District of Columbia

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DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

JAMES W. KNAPP,
Attorney,
Department of Justice.

QUESTION PRESENTED

The District Court, recognizing the absence of prejudice, dismissed an indictment on the theory that 11 D.C. Code § 2306 (Supp. IV, 1965) required the grand jury to be summoned by the Chief Judge even though Rule 6 (a), F.R. Crim. P., empowers "the court" to perform that function. Since § 2306 had in its earlier form been superseded by Rule 6 (a), and in its present form has been included in a general revision and codification of Title 11 (probably by inadvertence) and, in any event, is directory and not mandatory, did not the District Court err in its action?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19154

UNITED STATES OF AMERICA, APPELLANT

v.

WALLACE & TIERNAN, INC., ROBERT T. CONNER, CHARLES E. HOUGH, APPELLEES

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia entered on October 30, 1964, by Judge Youngdahl, granting appellee's motion to dismiss an eight-count indictment charging the above-named appellees with violations of 18 U.S.C. § 1001. Judge Youngdahl held that the grand jury which had returned the indictment had not been summoned in accordance with 11 D.C. Code § 2306 (Supp. IV, 1965) and that the indictment was a nullity (A. 43). Notice

of appeal was filed on November 30, 1964 (A. 45). The jurisdiction of this Court rests on 28 U.S.C. § 1291, 18 U.S.C. § 3731, and 23 D.C. Code § 105.

STATEMENT OF THE CASE

On March 10, 1964, Judge Edward A. Tamm of the United States District Court was, by order of Chief Judge McGuire, designated beginning on April 7, 1964, to serve as the judge to preside over Criminal Court No. 1 until further order (A. 19). It was a part of Judge Tamm's duty under such designation to preside over matters arising in the grand jury, receive the return of indictments, and dismiss grand jurors who had completed their terms of service or who were unable to serve for reasons of ill health or otherwise. It has been the customary practice in the District of Columbia for many years for the judge presiding over Criminal Court No. 1 to order the summons of grand juries in the District of Columbia and to discharge such juries and jurors upon termination of their period of service (A. 37).

On April 29, 1964, the United States Attorney for the District of Columbia communicated with Judge Tamm by letter, advising him that an additional grand jury was necessary and in the public interest and requesting that it be impaneled (A. 20). On May 1, 1964, Judge Tamm directed that an additional grand jury be summoned, and on May 19, 1964, such grand jury was impaneled and sworn before Judge Tamm. At this time Judge Matthew F. McGuire was Chief Judge of the United States District Court for the District of Columbia and was present and in active service (A. 37).

On August 24, 1964, the grand jury impaneled and sworn on May 19, 1964, returned an indictment charging appellees in eight counts with violations of 18 U.S.C. § 1001. Appellees were arraigned on August 28, 1964, and entered pleas of not guilty (A. 26).

Thereafter the appellees filed motions to dismiss the indictment on various grounds, among which were that

the grand jury impaneled and sworn on May 19, 1964, was illegally instituted and impaneled in violation of provisions of the District of Columbia Code and that its proceedings and actions were a nullity in law (A. 31, 33). On October 30, 1964, Judge Youngdahl by memorandum opinion, *United States* v. *Wallace & Tiernan, Inc.*, 234 F. Supp. 780 (D.D.C. 1964), granted appellees' motions and dismissed the indictment on the ground that the special grand jury was not summoned by the Chief Judge and was illegally constituted (A. 35-44). He held that 11 D. C. Code § 2306 (Supp. IV, 1965) required the Chief Judge personally to perform this function and that another district judge could not perform it. The holding was predicated on the conclusion that the revision and codification of Title 11, D.C. Code (P.L. 88-241, 77 Stat. 478 (1963)) could be read in harmony with Rule 6 (a), F.R. Crim. P., in that it specifies who on the District Court for the District of Columbia must exercise the power conferred on the court by Rule 6 (a).

STATUTE INVOLVED

Title 11, District of Columbia Code, Section 2306 (Supp. IV, 1965), provides in pertinent part:

> (a) Grand and Petit Jurors for the District Court.—At least ten days before the commencement of each term of the United States District Court for the District of Columbia, at which jury trials are to be had, the jury commission shall:
>
> (1) publicly break the seal of the jury box and draw therefrom, by lot and without previous examination, the names of such number of persons as the court directs to serve as grand and petit jurors in the court; and
>
> (2) forthwith certify to the clerk of the court the names of the persons so drawn as jurors.
>
> If the United States Attorney for the District of Columbia certifies in writing to the chief judge of

the District Court, or in his absence, to the presiding judge, that the exigencies of the public service require it, the judge may, in his discretion, order an additional grand jury summoned, which shall be drawn at such time as he designates. Unless sooner discharged by order of the chief judge, or, in his absence, the presiding judge, the additional grand jury shall serve to the end of the term in and for which it is drawn.

RULE INVOLVED

Rule 6 (a), Federal Rules of Criminal Procedure, provides:

> The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

STATEMENT OF POINTS

1. The District Court erred in dismissing the indictment returned by the May 19, 1964, grand jury on the ground that the order directing the grand jury to be summoned had not been signed by the Chief Judge of the District Court.

SUMMARY OF ARGUMENT

I. The Government contends that the revision and codification of Title 11 of the District of Columbia Code, which included as a part of § 2306 a reenactment of a former statutory provision providing for discretionary summoning of an additional grand jury by the Chief Judge, is not intended to limit, within the District of Columbia, the power conferred upon all United States District Judges by the Federal Rules of Criminal

Procedure. The Government maintains that the original statute was superseded by Rule 6 of the Rules of Criminal Procedure because of the provision in the Act of June 29, 1940, 54 Stat. 688, which stated that all laws in conflict with the Rules prescribed by the Supreme Court shall be of no further force and effect. Amendments to this statute indicate a Congressional intent that the provisions in the Rules shall remain paramount.

The revision and codification of Title 11 of the District of Columbia Code in 1964 contemplated the omission of obsolete, superseded or repealed sections, including those in conflict with the Federal Rules, and was not intended to change the substantive law then in effect. Therefore, the applicable rule of construction is that where there has been an intermediate act which qualifies or limits an earlier one, a reenactment of the earlier statute will not repeal the intermediate act which will be regarded as remaining in effect and modifying the new act in the same manner as it did the first.

Moreover, compliance with the exact language of 11 D.C. Code § 2306 is not possible and was not possible at the time of its adoption, because it is predicated upon the existence of terms of Court which were abolished by rule of court prescribed pursuant to statutory authority.

II. If the statute, as it now stands, has any force at all, it is directory in nature and is intended to assure that grand juries will not be impaneled unnecessarily. The part of 11 D.C. Code § 2306 under consideration is in many respects similar to the provisions of a former statute (28 U.S.C. § 421, 1940 ed.) which several courts of appeal held was not intended to legislate as to the validity of indictments or to impose mandatory restrictions on the courts.

The action of the District Court complies with the implicit direction in the statute that the District Judge best informed as to the nature and extent of the criminal business of the court and the actual need for extra grand juries was, by division of the business of the court, en-

trusted with determining the need for and ordering summoned such additional grand juries as might be required.

Inasmuch as the irregularity in the impaneling of the Grand Jury which returned the indictment in this case is not one which in fact or as a matter of law resulted in prejudice or harm to the appellees, the motion to dismiss the indictment should have been denied.

ARGUMENT

I The power conferred by the Federal Rules of Criminal Procedure to summon grand juries is not limited by 11 D.C. Code § 2306.

The Government contends that Rule 6 of the Federal Rules of Criminal Procedure confers the authority for summoning grand juries and that the power conferred thereby is not lessened or limited by 11 D.C. Code § 2306 (Supp. IV, 1965). The latter section is the successor to 11 D.C. Code § 1408 (1961 ed.), which was enacted in 1922 and provided as follows:

> Whenever the United States Attorney for the District of Columbia shall certify in writing to the Chief Judge of the United States District Court for said District, or, in his absence, to the senior associate judge of said court, that the exigencies of the public service require it, said chief judge or senior associate judge may, in his discretion, order an additional grand jury summoned, which additional grand jury shall be drawn at such time as he may designate in the manner provided by law for the drawing of grand jurors in the District of Columbia, and unless sooner discharged by order of said chief judge, or, in his absence, senior associate judge said additional grand jury shall serve during and until the end of the term in and for which it shall have been drawn.

By the Act of June 29, 1940, 54 Stat. 688, Congress authorized the Supreme Court to prescribe rules of pleading, practice, and procedure with respect to criminal cases in the district courts of the United States. That Act

provided that the rules should not take effect until they had been reported to Congress by the Attorney General at the beginning of a regular session and "thereafter all laws in conflict therewith shall be of no further force and effect." This statute has been amended from time to time to permit the Court to amend its rules. It now contains a further clause designed to protect the rules from erosion. That clause provides:

> Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court. 18 U.S.C. § 3771.

These rules were reported to the Congress by Attorney General Biddle by letter dated January 3, 1945, and became effective September 1, 1945.[1]

Rule 6 (a) of the Federal Rules of Criminal Procedure provides:

> The court shall order one or more grand juries to be summoned at such times as the public interest requires.

Other subsections provide that the court shall appoint the foreman and deputy foreman (Rule 6 (c)); that the indictment shall be returned "to a judge in open court" (Rule 6 (f)); and that a grand jury shall serve "until discharged by the court" but limits its service to eighteen months (Rule 6 (g)). The latter clause also authorizes "the court" to excuse a juror and to impanel another person in his place. It will be further observed that the Rules of Criminal Procedure apply to "all criminal proceedings in the United States District Courts" (Rule 54).[2]

Thus it is clear that the Congress intended that once they were prescribed by the Supreme Court the rules were

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[1] See H.R. Doc. No. 12, 79th Cong., 1st Sess. (1945); Rule 59, F.R. Crim. P.

[2] Rule 54 as originally adopted specifically included the "District Court of the United States for the District of Columbia." See S. Doc. No. 175, 79th Cong., 2d Sess. (1946).

to be paramount and to take precedence over all other laws which might be in conflict therewith. It has not lessened or diminished in this resolve, as is manifested by the later enactment providing that nothing in the criminal laws shall in any way limit, supersede, or repeal the criminal rules. 18 U.S.C. § 3771.

Accordingly, when the Federal Rules of Criminal Procedure became effective, the provisions of 11 D.C. Code § 1408 were repealed. *Jordon* v. *United States*, 93 U.S. App. D.C. 65, 207 F.2d 28 (1953); *Broden* v. *Bowles*, 35 F.R.D. 13 (D.D.C. 1964). However, for some reason later editions of the District of Columbia Code failed to make note of this fact.

The provisions of former § 1408 were incorporated into 11 D.C. Code § 2306 (Supp. IV, 1965) as a result of the revision, the codification of part II of the District of Columbia Code. P.L. 88-241, 77 Stat. 478 (1963). In its report [3] the Senate Committee on the Judiciary stated that the purpose of this enactment was not to change substantive law but to put that law in a form that would be more useful and understandable. By revision, the Committee stated that it meant the omission of obsolete, superseded or repealed sections and the consolidation of similar provisions. The House Committee on the Judiciary also expressed the same views in its statement of the purpose of enactment.[4] Both reports stated that in addition to the usual comparison of similar statutes to determine what parts of older ones were in conflict with later enactments, considerable study had to be given to the problem of reconciling statutory procedural provisions with the Federal Rules of Civil Procedure and other court rules adopted under the authority of law.

It is evident, therefore, that the Congress had no intention of enacting new legislation affecting procedures which had been previously enacted or adopted for use in

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[3] S. REP. No. 743, 88th Cong., 1st Sess., p. 4 (1963).

[4] H.R. REP. No. 377, 88th Cong., 1st Sess., p. 2 (1963).

the federal District Courts, either by statute or by rules prescribed by the Supreme Court.[5]

Under these circumstances, it is a well-settled rule of construction that no intent to change the law shall be inferred from a comprehensive reenactment of a code even where there have been minor changes in phraseology. *Ruth* v. *Eagle-Pitcher Co.*, 225 F.2d 572 (10th Cir. 1955); *Oklahoma Tax Comm'n* v. *Stanolind Pipe Line Co.*, 113 F. 2d 853, 856 (10th Cir.), *cert. denied*, 311 U.S. 693 (1940); and where, as here, there has been an intermediate act which qualifies or limits an earlier one, a reenactment of the earlier statute will not repeal the intermediate act, which will be deemed to remain in force and so modifying or qualifying the new act in the same manner as it did the first. *George* v. *City of Asheville*, 80 F.2d 50, 56 (4th Cir. 1935).

Moreover, it will be observed that 11 D.C. Code § 2306 (a) is predicated upon the existence of terms of Court, since it provides that grand jurors shall be selected at least ten days before the commencement of each term of court, and that, unless sooner discharged, the additional grand jury "shall serve until the end of the term in and for which it was drawn." Such terms were abolished on October 16, 1963, prior to the 1964 recodification, and the District Court for the District of Columbia now sits in continuous session (28 U.S.C. § 138; Rule 2 (a), Rules of the United States District Court for the District of Columbia.)

Therefore, it is not presently possible to ascertain what grand juries are original and what are additional within the meaning of § 2306. This being the case, it is also impossible to say when the service of any grand jury must cease. It is fairly obvious that Rule 6 of the Federal Rules of Criminal Procedure must apply in the Dis-

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[5] For example, the provisions of former § 1406 relating to the term of service of the grand jury and the selection of the foreman were omitted because those matters were covered by Rules 6 (c) and 6 (g) of the Federal Rules of Criminal Procedure. S. REP. No. 743, *supra*, p. 221; H.R. REP. No. 377, *supra*, p. A212.

trict of Columbia, since that Rule makes no reference to terms of court but limits the period of service to eighteen months (Rule 6 (g)).

It is apparent that the revisers did not eliminate every obsolete or inconsistent provision of the old code. Their failure to recognize that the provisions of former § 1408 were superseded by the Federal Rules should not now be distorted into a Congressional intent to provide for a grand jury procedure in the United States District Court for the District of Columbia that is different from that prescribed in every other United States District Court. Particularly is this true when no rational basis exists for making this District Court different from other district courts in this regard. Moreover, no rational basis exists for concluding that Congress saw an unannounced basis for such a change.

II. The provisions of 11 D.C. Code § 2306, if operative, are directory, not mandatory, and since failure to conform to their exact wording has not prejudiced appellees, the indictment should not be held to be invalid.

Appellees did not assert that they had been harmed or in any way prejudiced as a result of the grand jury's having been ordered summoned by a district judge who was not the chief judge. Indeed, there is no contention that there was any other irregularity or impropriety in connection with the selection or impaneling of the grand jurors.

It has been the rule for many years, in this Court as well as in other courts of appeal, that irregularities in the impaneling or selection of grand jurors do not necessarily invalidate indictments returned by such a grand jury. It is incumbent upon the defendant to allege and prove facts showing that he has been harmed or prejudiced by the irregularity of which he complains. *Breese* v. *United States*, 226 U.S. 1 (1912); *Agnew* v. *United States*, 165 U.S. 36 (1896); *Romney* v. *United States*,

83 U.S. App. D.C. 150, 167 F.2d 521, *cert. denied*, 334 U.S. 847 (1948); *Medley* v. *United States*, 81 U.S. App. D.C. 85, 155 F.2d 857, *cert. denied*, 328 U.S. 873 (1946); *United States* v. *Parker*, 103 F.2d 857 (3d Cir.), *cert. denied*, 307 U.S. 642 (1939).

Since the irregularity of which the appellees complained is not one which would result in a discrimination or exclusion of any groups or classes of persons otherwise eligible as jurors, the appellees were not denied their right to indictment by a jury of the type accorded by law. Neither has the composition of the jury been asserted to have been infected by the challenged order of summons, nor has it been contended that they were influenced in their deliberations. Under such circumstances to hold an indictment invalid because the grand jury which returned it was not ordered summoned by one particular district judge is "to make of the grand jury a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry into criminal wrongdoing." *United States* v. *Johnson*, 319 U.S. 503, 512 (1943); Rule 52(a), F.R. Crim. P.

If, as the court below suggests, 11 D.C. Code § 2306 can be considered as being in harmony with Rule 6 (a), F.R. Crim. P., its provisions are directory and not mandatory. The basis for determination of whether a statute is mandatory or directory was long ago set out by the Supreme Court in *French* v. *Edwards*, 13 Wall. (80 U.S.) 506, 511 (1872), wherein it said:

> There are, undoubtedly, many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall

> not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent the sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory.

The District of Columbia Code provision is clearly designed "to secure order, system and dispatch in proceedings," and the rights of those accused of crime are not injuriously affected by the fact that the order was signed by a district judge who was not the chief judge. The grand jury was ordered summoned by Judge Tamm who was sitting by designation as the judge presiding over the Criminal Court No. 1. In his opinion Judge Youngdahl pointed out that "the criminal number one judge, as a result of aged custom and practice in this court, has and discharges the responsibility of summoning additional grand juries." Thus the summoning and the supervision of the grand jury is a part of the business of the court as to which the judges may, for convenience and the good administration of justice, make arrangements among themselves. Insofar as there is power to make orders with respect to the work of regular grand juries, each judge at all times has all the power possessed by the court. In *United States* v. *Malone*, 18 F. Supp. 865 (N.D. Ill. 1937), Judge Wilkerson was called upon to decide whether an order continuing the authority of a grand jury to sit during the next term of court was one which could be validly issued only by the chief judge, and he decided that any district judge could grant such authorization. The statute in question, 28 U.S.C. § 421 (1940 ed.), stated that "the district judge or the senior district judge, as the case may be, may . . . by order, authorize any grand jury to continue to sit" during the succeeding term for the purpose of finishing investigations already begun. Judge Wilkerson expressed the view that since the statute was a guide to public officers, it should be

interpreted so as to facilitate and not to obstruct the performance of their duties.

The predecessor statute, 11 D.C. Code § 1408 (1961 ed.), was originally enacted in 1922 at the suggestion of the Attorney General, who needed an additional grand jury to investigate cases of war frauds.[6] Its revival in 1964, if not due to an oversight by the reviser, certainly can have no such basis, since the court already had authority under Rule 6 (a) of the Federal Rules of Criminal Procedure to order summoned any additional grand juries that were necessary to handle criminal matters.

Since all judges of a multi-judge court have powers that are equal and coextensive, *Tanner Motor Livery, Ltd.*, v. *Avis, Inc.*, 316 F.2d 804, 809 (9th Cir.), *cert. denied*, 375 U.S. 821 (1963), it is not likely that Congress intended to diminish or to restrict the power of all the district court judges except the Chief Judge of the District Court for this district while leaving unfettered the powers of all other United States District Court judges.[7] The situation suggests that if Congress had any intent at all, it was to assure that grand juries in this district would not be impaneled in the absence of a showing of the necessity therefor. The statute is, therefore, directive and not mandatory and imparts a direction that the summoning of grand juries be handled by one judge who is familiar with the criminal business before the court, its volume, its nature, and the need for extra grand juries to handle special investigations.

The exercise of the power by the district judge sitting in Criminal Court No. 1 complies with such a directive.

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[6] See H.R. REP. No. 943, 67th Cong., 2d Sess. (1922); 62 Cong. Rec. 5932, 6998-7001 (1922).

[7] *Cf. Reuben* v. *United States*, 86 F.2d 464, 470 (7th Cir. 1936), *cert. denied*, 300 U.S. 671 (1937), in which the court said by way of dictum, "It would not be in the interest of justice or the orderly administration of the criminal business of the District Courts, if so important a matter as the continued existence of a grand jury were to depend upon the presence and ability to act of but a single individual."

He is, by virtue of his assignment, better informed at the moment than any other judge, including the Chief Judge, as to the extent and nature of the criminal docket, the number of those persons in jail awaiting trial or indictment and the number of matters being handled by the grand jury. When the reenactment is viewed in this light, it is obvious that Congress had no intent to legislate as to the validity of indictments. It merely wished the practice to continue to insure that extra grand juries would be impaneled in a prudent manner.

At the time the Federal Rules became effective there were in existence a number of statutes relating to the grand jury. In some instances the rules merely restated existing law.[8] However, the first sentence of Rule 6 (a) superseded 28 U.S.C. § 421 (1940 ed.), which related to the summoning and length of service of grand juries. That section provided, in part:

> No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to a district judge of the district that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury.[9]

In construing the language of that statute which is similar to that part of 11 D.C. Code § 2306 relating to the summoning of grand juries, the courts of appeal of

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[8] As, for example, the statement in Rule 6 (a) that "The Grand Jury shall consist of not less than 16 nor more than 23 members" which was a restatement of 28 U.S.C. § 419 (1940 ed.).

[9] The remainder of the statute authorized the summoning of a third grand jury in the Southern District of New York, and the extension of the period of service of a grand jury to finish investigations begun during the term.

other circuits have held that Congress, in adopting such provisions, had no intent to legislate as to the validity of indictments and that the purpose was merely to prevent the expense of having a grand jury unnecessarily summoned, and that the statute was directory. *Nolan* v. *United States*, 163 F.2d 768 (8th Cir. 1947), *cert. denied*, 333 U.S. 846 (1948); *Morris* v. *United States*, 128 F.2d 912 (5th Cir.), *cert. denied*, 317 U.S. 661 (1942); *Breese* v. *United States*, 203 Fed. 824, 828 (4th Cir. 1913).

In the *Morris* case the court held that an indictment returned by a second grand jury sitting in the Western District of Louisiana was valid, even though there was no borough or city of 300,000 population in the district, as was required by the statute as a prerequisite to the impaneling of a second grand jury. That court was of the opinion that the provisions of 28 U.S.C. § 421 (1940 ed.) relating to the number of grand juries permissible in the different situations named therein "was only directory and not intended to impose mandatory restrictions on the judge." [10] 128 F.2d at 916.

Other former statutory provisions relating to the manner of serving summons on the grand jurors (28 U.S.C. § 416, 1940 ed.) were held to be directory and not mandatory. Thus indictments returned by grand juries whose members had been notified by mail were upheld even though the court had not entered the prescribed statutory order permitting such means of service. *Seadlund* v. *United States*, 97 F.2d 742 (7th Cir. 1938); *United States* v. *Morse*, 292 Fed. 273, 279 (S.D.N.Y. 1922).

Thus at least three courts of appeal and several district courts have construed a general statute similar in most respects to the provisions of the District of Columbia Code here under consideration as directory internal regulations designed to promote efficiency in the transaction of public business and not as limitations upon the authority of the grand jury. The legislation, therefore,

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[10] *Cf. United States* v. *Perlstein*, 39 F. Supp. 965, 971 (D.N.J. 1941).

was not such as was intended to affect the validity of indictments, and the failure of the district court to abide by the exact statutory language is at most an irregularity as to which appellees may complain only if they can show that they were in some way prejudiced by it.

The same issue has been raised in the district court below in at least four other cases in which indictments have been returned by a special grand jury. In each instance a different district judge has refused to dismiss the indictment.[11]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court dismissing the indictment in this case is erroneous and should be reversed, the indictment reinstated, and the cause placed on the calendar for trial.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
Assistant United States Attorney.

JAMES W. KNAPP,
Attorney,
Department of Justice.

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[11] *United States* v. *Brown*, 36 F.R.D. 204 (D.D.C. 1964) (Judge Holtzoff); *United States* v. *Gaston*, Cr. No. 722-64—Motion denied by Judge Walsh; *United States* v. *Post*, Cr. No. 580-64—Motion denied by Judge Matthews; *United States* v. *Bowles*, Cr. No. 946-64—Motion denied by Judge McGarraghy.

APPENDIX

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[Filed March 10, 1964]

IN THE UNITED STATES DISTRICT COURT,
FOR THE DISTRICT OF COLUMBIA

Voting: Chief Judge McGuire and Judges Pine, Holtzoff, Keech, Curran, Tamm, McLaughlin, Matthews, Youngdahl, McGarraghy, Sirica, Hart, Walsh, Jones and Robinson

ORDER

IT IS ORDERED That the following assignment of Judges to the Special Parts of this Court be, and the same is hereby made, effective from and including April 7, 1964, until further order of the Court:

Assignment Judge, who will try criminal and civil cases as exigencies require.....Chief Judge McGuire

Motions Court No. 1.....Judge Curran
Motions Court No. 2.....Judge Hart

Criminal Court No. 1.....Judge Tamm
Criminal Court No. 2.....Judge Pine
Criminal Court No. 3.....Judge McLaughlin
Criminal Court No. 4.....Judge Sirica
Criminal Court No. 5.....Judge Jones
Criminal Court No. 6.....Judge Robinson

Civil Court No. 1 (Jury).....Judge Keech
Civil Court No. 2 (Jury).....Judge Matthews
Civil Court No. 3 (Jury).....Judge McGarraghy
Civil Court No. 4 (Jury).....Judge Walsh
Civil Court No. 5 (Non-Jury and Pretrial).....Judge Holtzoff
Civil Court No. 6 (Non-Jury and Condemnation).....Judge Youngdahl

BY THE COURT:

/s/ Matthew F. McGuire
Chief Judge

March 10, 1964

[Filed January 29, 1965]

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE UNITED STATES ATTORNEY
Washington, D.C.

Address all mail to:
United States Attorney
Room 3136-C
United States Court House Building
3rd and Constitution Avenue NW.

In reply, please refer to
Initials and Number
DCA:DSS:LL

April 29, 1964

Honorable Edward A. Tamm
Judge
United States District Court
for the District of Columbia
U. S. District of Columbia
Washington 1, D.C.

Dear Judge Tamm:

I believe it to be necessary and in the public interest that a Special Grand Jury be summoned on April 30, 1963, pursuant to Rule 6(a) of the Federal Rules of Criminal Procedure.

This Grand Jury will be needed because of a special matter to be handled by the Department of Justice. On days when it is not being used by the Department of Justice this office may be able to present cases to this Grand Jury.

Sincerely yours,

/s/ David C. Acheson
DAVID C. ACHESON
United States Attorney

[Filed April 29, 1964]

[Filed January 29, 1965, in Criminal Case No. 784-64]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORDER

It appearing to the Court that the public interest requires that a Special Grand Jury be summoned on April 30, 1964, it is by the Court this 29th day of April, 1964, pursuant to Rule 6(a) of the Federal Rules of Criminal Procedure,

ORDERED that a sufficient number of legally qualified persons be summoned to meet this requirement.

/s/ Edward A. Tamm
Judge

[Filed January 29, 1965]

CLERK'S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
WASHINGTON 1, D. C.

April 30, 1964

TO: HARRY M. HULL, Clerk
FROM: Paul A. Roser, Deputy Clerk
SUBJECT: Special Grand Jury

There is attached hereto letter dated April 29, 1964 from David C. Acheson, United States Attorney, addressed to Judge Edward A. Tamm, requesting that a Special Grand Jury be summoned on April 30, 1964, pursuant to Rule 6(a) of the Federal Rules of Criminal Procedure, together with an Order signed by Judge Tamm that a sufficient number of legally qualified persons be summoned to meet this requirement.

I wish to advise you that I was with Chief Judge McGuire this morning on the impaneling of jurors. The selection was completed at approximately 12:00 Noon and the jurors not needed were finally excused at that time. Approximately five or ten minutes past noon Mr. Dodd came to Court Room 20 and handed me the attached papers. I immediately contacted Asst. U. S. Attorney, Donald Smith, who is in charge of the Grand Jury and informed him that it was impossible to select a Grand Jury from the persons available this morning. He has advised me, however, that the Justice Department is insisting upon a Grand Jury being impaneled as soon as possible.

This information is being presented to you for any action you may deem necessary.

Respectfully submitted,

By /s/ Paul A. Roser

[Filed May 1, 1964]
[Filed January 29, 1965, in Criminal Case No. 784-64]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORDER

For the purpose of implementing the Order of April 29, 1964, directing the impaneling of a Special Grand Jury, it is, this 1st day of May, 1964,

ORDERED that the Jury Commission draw the names of one hundred (100) prospective jurors from the jury box and certify these names for the purpose of meeting this requirement; that the persons whose names are drawn be duly summoned to appear in this Court on the 14th day of May, 1964.

BY THE COURT:

/s/ Edward A. Tamm
Judge

I consent:

/s/ Donald S. Smith
Asst. U.S. Atty.

[Filed May 27, 1964]

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE COURT RESUMES ITS SESSION PURSUANT TO ADJOURNMENT

On the 19th day of May, 1964, a number of persons heretofore examined to to their competency for Jury Duty are found duly qualified, come into Court at ten o'clock, A. M., whereupon the following persons are selected as members of the Special Grand Jury for the May Term, 1964; EDWARD A. TAMM, PRESIDING:

Mrs. Beatrice A. Anderson	431 V Street, NW
Willie G. Beane	434 Quackenbos St. NW
Miss Thelma V. Bergdoll	1714 New Hamp. Ave. NW
Robert S. Bethe	4501 Conn. Ave., NW #301
Mrs. Doris D. Brown	120 Kenilworth Ave., NE
Mrs. Florence G. Brown	4114 Davis Place, NW #307
Wilbur S. Ellis	1920 Upshur Street, NE
John D. Epps, Jr.	1310 Sheridan Street, NW
Bobbie E. Fenter	3794 Nichols Ave., SE #305
Miss Theressa B. Graves	546 Nicholson St., NE
James E. Greene	602 Faraday Place, NE
James R. Heiskell	2707 Wisconsin Ave., NW
Mrs. Doris D. Lawhon	1328 Kennedy St. NW
Mrs. Rosemary B. Michie	1440 Chapin St., NW #5
Mrs. Stella R. O'Keane	1334 Ft. Stevens Dr., NW #6
Mrs. Mary F. Peterson	718 K Street, NE
Mrs. Anita S. Reed	7110-9th Street, NW
Miss Mignon L. Ricks	1316 Mich. Ave. NE
Miss Ruth Rizika	1722-19th Street, NW
Mrs. Martha E. Robinson	5431 Bass Place, SE
Clara L. Thomas	2311-15th St., NW #201
Mrs. Sarah F. Watkins	705 Langston Terrace, NE
Denvil A. Westfall	1225 Valley Ave., SE

and thereupon on the 19th day of May, 1964, the Grand Jury is duly constituted and sworn; and thereupon Robert S. Bethe is sworn as Foreman of the Special Grand

Jury and James R. Heiskell is sworn as Deputy Foreman of the Special Grand Jury, whereupon Wade Beall, William Murphy and Francis Getsinger are sworn as bailiffs to the said Grand Jury.

EDWARD A. TAMM

HARRY M. HULL, Clerk

By /s/ Daniel A. Mencoboni
Deputy clerk

EVA M. SANCHE
Official reporter

MAY 1964

CRIMINAL DOCKET

United States District Court for the District of Columbia

CASE CLOSED

PARTIES: United States *vs.* 1. Wallace & Tiernan, Inc.; 2. Robert T. Conner (53); 3. Charles E. Hough (45).

ATTORNEYS: U.S. Attorney Szukelwicz—Dept. of Justice; 1. F. B. Lacey, 1815 H St., N.W.; 2. Nicholas J. Chase, 777 14th N.W.; 3. F. B. Lacey, 1815 H St. N.W.

G. J. No.: 1. Orig.; 2. Orig.; 3. Orig.

CRIMINAL No. 78464

CHARGE: Concealing Material Facts Pending Before Food and Drug Administration (18, USC, 1001)

DATE FILED: 1. ——; 2. 8-28-64; 3. 8-28-64.

BOND: 1. —; 2. $100.00 Personal, 2350 N. Hillhurst Ave., Los Angeles, Cal.; 3. $100.00 Personal, 10 Kathleen Pl., Mossis Plains, N.J.

Date	Proceedings
1964 Aug. 24	Presentment and Indictment Filed (8 Counts)
1964 Aug. 28	No. 1, 2, 3: APPEARANCE of Frederick B. Lacey, Shanley Fisher and Kuykendall, 1815 H St., NW entered. No. 2, 3: PERSONAL RECOGNIZANCE in the sum of $100.00 taken by Defendant in lieu of Surety, filed.
1964 Aug. 28	No. 1, 2, 3: Copy of indictment given to defendants. ARRAIGNED, Plea NOT GUILTY entered; ORAL MOTION of DEFENSE COUNSEL for thirty (30) days to file appropriate motions, granted, and thirty (30) days for Government to reply, GRANTED;

CRIMINAL DOCKET

United States District Court for the District of Columbia

Date	Proceedings
1964 Aug. 28	Defendant's permitted to REMAIN IN CUSTODY OF COUNSEL pending making of Personal Bond; Attorney Frederick B. Lacey present. SIRICA, J. (Reporter-Ernest Markwalter)
1964 Sep. 25	MOTION of Defendant to dismiss or for other appropriate relief and Memorandum of Points and Authorities in support thereof, filed. Cert. of Serv.
1964 Sept. 28	No. 1, 3: MOTION TO DISMISS the Indictment, or in the alternative, to strike portions of the Indictment and to dismiss the third and sixth Counts of the Indictment and Points and Authorities in support thereof, filed. Cert. of Serv. MOTION for Bill of Particulars and Points and Authorities in support thereof, filed. Cert. of Serv.
1964 Sep. 28	No. 2: APPEARANCE of Nicholas J. Chase, Esq. Counsel for defendant, filed. MOTION to strike portions of the indictment and to dismiss the Sixth Count of the Indictment and for other appropriate relief, filed. Cert. of Serv. MOTION for Bill of Particulars, filed. Cert. of Serv.
1964 Oct. 6	No. 1, 2, 3: OPPOSITION of Government to Motions to dismiss Indictment or Counts, To strike portions thereof, and for Bill of Particulars and Points and Authorities in support thereof, filed. Cert. of Serv.

CRIMINAL DOCKET

United States District Court for the District of Columbia

Date	Proceedings
1964 Oct. 9	No. 1, 2, 3: MOTION of DEFENDANT to dismiss or for other appropriate relief, heard, argued and TAKEN UNDER ADVISEMENT; Government allowed 3 days to file supplemental Points & Authorities and defendants allowed 3 days thereafter to file reply; Continued until October 30, 1964; Defendant ON BOND. No. 1: Attorney Nicholas J. Chase present. No. 2: Attorney Barnum L. Colton, Jr. present. No. 3: Attorney Frederick Lacey present. YOUNGDAHL, J. (Reporter—E. A. Kaufman) Cert. filed.
1964 Oct. 9	No. 2: MOTION to strike portions of the indictment, etc., and Motion for bill of particlars continued until October 30, 1964; Defendant ON BOND; Attorney Barnum L. Colton, Jr. present. YOUNGDAHL, J. (Reporter—E. A. Kaufman)
1964 Oct. 9	No. 1, 3: MOTION to dismiss the indictment, etc., and Motion for bill of particulars continued until October 30, 1964; Defendant ON BOND; No. 1: Attorney Nichlas J. Chase present. No. 3: Attorney Frederick Lacey present. YOUNGDAHL, J. (Reporter—E. A. Kaufman)

CRIMINAL DOCKET

United States District Court for the District of Columbia

Date	Proceedings
1964 Oct. 14	No. 1, 2, 3: SUPPLEMENTAL statement of opposing Points and Authorities to the motion to dismiss based on the question of the legality of the special Grand Jury, Exhibit, Copy of Memorandum of Court upon submission of defendant, Underwood's plea in abatement and motion to quash indictment, filed by Government.
1964 Oct. 16	No. 1, 3: Reply to supplemental statement of opposing Points and Authorities to the motion to dismiss based on the question of the Legality of the Special Grand Jury, Cert. of Serv. and Exhibit, filed.
1964 Oct. 19	No. 2: Reply of defendant to Government's Supplemental Statement of opposing Points to Motion to Dismiss based on Illegality of Special Grand Jury, filed. Cert. of Serv.
1964 Oct. 30	No. 1, 2, 3: MEMORANDUM and ORDER DISMISSING Indictment and dismissing as MOOT all other motions, filed. YOUNG-DAHL, J. (N)
1964 Nov. 30	No. 1, 2, 3: NOTICE OF APPEAL from Memorandum and Order of 10-30-64, filed by Government (No Fee).
1964 Dec. 30	No. 1, 2, 3: ORDER EXTENDING TIME to file Record on Appeal and docket the proceedings to and Including February 18, 1965, filed. HOLTZOFF, J. Cert. of Serv. (N) (N Chase 1-11-65)
1965 Jan. 29	No. 1, 2, 3: ORDER DIRECTING the Clerk to file in the Record herein true copies of the following Official records of the Court:

CRIMINAL DOCKET

United States District Court for the District of Columbia

Date	Proceedings
1965 Jan. 29	1. Letter dated 4-29-64 from U.S. Attorney to Judge Tamm; 2. Orders of Judge Tamm dated 4-29-64 and 5-1-64; 3. Memorandum dated 4-30-64 from Deputy Clerk to Harry M. Hull, Clerk; 4. Certificate of Impanelling of Special Grand Jury on 5-19-64; and FURTHER ORDERING that the entire record be transmitted to the United States Court of Appeals as a Record on Appeal herein, filed. YOUNGDAHL, J. Letter dated 4-29-64 from U. S. Attorney addressed to Judge Tamm requesting that a Special Grand Jury be summoned, filed. Certified copies of Orders of Judge Tamm dated 4-29-64 and 5-1-64 summoning Grand Jury, filed. Memorandum dated 4-30-64 from Deputy Clerk to Harry M. Hull, Clerk, filed. Certified copy of Certificate impanelling special Grand Jury dated 5-19-64, and filed 5-27-64, filed.

[Filed September 25, 1964]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Special May 1964 Grand Jury Sworn in on May 19, 1964

Criminal No.:784-64

Grand Jury No.: Original

Violation: 18 U.S.C. 1001
(Concealing Material Facts)

THE UNITED STATES OF AMERICA

v.

WALLACE & TIERNAN, INC.
ROBERT T. CONNER
CHARLES E. HOUGH

MOTION TO DISMISS OR FOR OTHER APPROPRIATE RELIEF

The defendant, Robert T. Conner, having been granted leave to withdraw his plea of not guilty on August 28, 1964, does hereby withdraw the said plea of not guilty, and moves that the indictment be dismissed on the following grounds:

(1) The Court is without jurisdiction and the indictment is a nullity for the reason that the special grand jury sworn in on May 19, 1964 was illegally instituted, impanelled and its actions and proceedings are a nullity in law; the said special grand jury purported to vote an indictment of this defendant on July 28, 1964 and purported to return said indictment in open Court thereafter;

(2) The said purported indictment was returned by an illegally constituted body in violation of Title 11-1408 (District of Columbia Code, 1961);

(3) The said indictment was returned in violation of the provisions of Title 11-1408 (District of Columbia Code, 1961) and Rule 6 of the Federal Rules of Criminal Procedure.

There is attached hereto a Memorandum Of Points And Authorities which is to be deemed a part hereof.

The defendant prays that an oral hearing be had as an incident to the instant motion and that oral testimony be taken if required.

Respectfully submitted,

/s/ Nicholas J. Chase
NICHOLAS J. CHASE
BARNUM L. COLTON, JR.
1216 Wyatt Building
Washington, D.C. 20005
Attorneys for Robert T. Conner

[Filed September 28, 1964]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(Holding A Criminal Term)

Criminal No. 784-64

THE UNITED STATES OF AMERICA

vs.

WALLACE & TIERNAN, INC., ROBERT T. CONNER, CHARLES E. HOUGH

MOTION TO DISMISS THE INDICTMENT, OR, IN THE ALTERNATIVE, TO STRIKE PORTIONS OF THE INDICMENT AND TO DISMISS THE THIRD AND SIXTH COUNTS OF THE INDICTMENT.

Now come the defendants Wallace & Tiernan Inc. and Charles E. Hough, through counsel, and move the Court for an Order dismissing the Indictment on the grounds that it was returned by a Grand Jury which was illegally constituted (as more fully set forth in the Motion filed by defendant Robert T. Conner) or, in the alternative, for an Order striking portions of the Indictment and an Order striking the Third and Sixth Counts of the Indictment. These defendants also ask for such other and further relief as may be appropriate, including permission to withdraw the pleas of not guilty entered by them should same be deemed necessary for proper consideration of the Motion to dismiss the Indictment.

The portions of the Indictment sought to be stricken are the phrases "and subsequently expired" which appear as follows: Second Count, paragraphs 4 (c), 4 (d) and 4 (j) at pages 7 and 8; Fifth Count, paragraphs 5 (c), 5 (d) and 5 (j) at pages 15 and 16-17; Seventh Count, subparagraph (c) at page 20; Eighth Count, paragraphs 3 (c) and 3 (d) at pages 22 and 23. The grounds of

this part of the Motion are that such language is surplusage, inflammatory and prejudicial.

The Third and Sixth Counts of the Indictment are sought to be stricken on the grounds of multiplicity, viz., that the offense charged in the Third Count is comprehended by and identical to the offense charged in the Second Count, and that the offense charged in the Sixth Count is comprehended by and identical to the offense charged in the Fifth Count.

A Memorandum of Points and Authorities in support of this Motion is attached, except that as to the Motion to dismiss the indictment, defendant Conner having filed a Memorandum, these defendants do not do so.

SHANLEY, FISHER & KUYKENDALL
Attorneys for Defendants

By F. B. Lacey
FREDERICK B. LACEY
1815 H Street, Northwest
Washington 6, D. C.
(EXecutive 3-8250)

[Filed October 30, 1964]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 784-64

UNITED STATES OF AMERICA

v.

WALLACE & TIERNAN, INC., ROBERT T. CONNER, CHARLES E. HOUGH

MEMORANDUM AND ORDER

The defendants were indicted for having knowingly and willfully falsified and concealed material facts in a matter within the jurisdiction of an agency of the United States in violation of 18 U.S.C. § 1001 (1958). The case arose out of information submitted by the defendants to the Food and Drug Administration relating to Dornwal, a new tranquilizer. By means of a pretrial motion to dismiss the indictment on the ground that the special grand jury which returned it was illegally constituted, the defendants have raised a purely legal question of statutory interpretation and construction. Hence, further elaboration of the evidentiary facts which engendered legal action is unnecessary.

Some background, however, and reference to relevant statutory provisions are essential to illuminate the issue. On February 13, 1964, the acting Attorney General of the United States designated two Department of Justice attorneys to conduct grand jury inquiry into the subject matter of the indictment. The United States Attorney for the District of Columbia addressed a letter to Judge Tamm of this court on April 29, 1964, which stated that is was necessary in the public interest that a special grand jury be summoned on April 30, 1964, under authority of Rule 6(a) of the Federal Rules of Criminal

Procedure. On the same date, April 29, Judge Tamm entered an order directing that legally qualified persons be summoned to serve on a special grand jury required by the public interest. That special grand jury was selected on May 14, 1964, and indicted the defendants on July 28, 1964.

The authority invoked and exercised in summoning this additional grand jury was Federal Rule of Criminal Procedure 6(a) which provides, in pertinent part, that "the court shall order one or more grand juries to be summoned at such times as the public interest requires." In challenging this procedure, the defendants rely upon a provision of the District of Columbia Code which also deals with additional grand juries. Section 1408 of Title 11 (1961 ed.), which was enacted in 1922, long prior to Rule 6(a), provides:

> Whenever the United States attorney for the District of Columbia shall certify in writing to the chief judge of the United States District Court for said District, or, in his absence, to the senior associate judge of said court, that the exigencies of the public service require it, said chief judge or senior associate judge may, in his discretion, order an additional grand jury summoned . . . .

In 1963, Congress revised Title 11 and transformed old Section 1408, quoted above, into new Section 2306, which consolidated several provisions of old Title 11. The second paragraph of new Section 2306(a) is in substance a reinactment of old Section 1408. The only significant change in language was the substitution of "presiding judge" for "senior associate judge" in the earlier section.[1]

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[1] The stated reason for the change was to conform this section to 28 U.S.C. § 136 (1958). H.R. Rep. No. 377, 88th Cong., 1st Sess. A52-53 (1963); S. Rep. No. 743, 88th Cong., 1st Sess. 60-61 (1963). Section 136 designates the judge senior in commission under seventy as the chief judge and directs that he "preside at any session which he attends." Subsection (e) further states that: "if a chief judge is temporarily unable to perform his duties as such, they shall be performed by the district judge in active service,

During oral argument, the parties stipulated that Chief Judge McGuire was not absent during the times here material, but was holding court and in the full performance of his duties.

Thus, at this point, the problem raised comes into focus and can be stated with some understanding. The defendants' position is that a special grand jury must be called or summoned by the chief judge, or in his absence, by the "presiding judge" in order to be legally constituted. They contend that new Section 2306 prevails over, or at least limits, the authority conferred on the "court" by Rule 6(a). Consequently, they argue, since the chief judge was not absent and did not himself summon the special grand jury that returned the indictment in this case, that grand jury was unlawfully constituted and the resulting indictment a nullity. On the other hand, the government asserts that Judge Tamm's action was proper because Rule 6(a) bestows either superseding or additional authority on the "court", meaning any judge,[2] to summon an additional grand jury. Alternatively, the government suggests that Judge Tamm was a "presiding judge" within Section 2306 in that he was designated by the chief judge to "preside" over criminal division number one of this court during the times in question. Further, the criminal number one judge, as a result of aged custom and practice in this court, has and discharges the responsibility of summoning additional grand juries. Accordingly, it is urged, because of this division of judicial function among the members of the court, the chief judge was absent for purposes of Section 2306, although physically present.

The obvious question at the outset is whether either Section 2306 or Federal Rule 6(a) prevails to the ex-

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present in the district and able and qualified to act, who is next in precedence." This section appears merely to insure the continual presence of a "presiding judge" on a multi-judge court, in the office of that judge senior in commission under seventy who is present, active and qualified.

[2] See note 9 infra, and accompanying text.

clusion of the other. Alternatively, it must be determined whether they can be read together to give effect to both. These inquiries are two sides of the same coin, each subsuming the other. To answer them requires some historical perspective.

Prior to 1922, the Federal Judicial Code provided in substance that most district courts had authority to summon only one grand jury at a time at a single place of holding court.[3] In 1922, the Justice Department offered legislation which would permit additional grand juries in the District of Columbia. The impetus for such a bill appears to have resulted from congestion in the District's criminal docket[4] produced largely by a heavy volume of war fraud cases.[5] In response to the alleged need, Congress passed an act which later became Section 1408, as quoted above. It is clear from the legislative history that the purpose of this act was to allow the court to summon an additional grand jury in the manner prescribed.[6] No doubt the statute was written to limit the exercise of this power to the chief or senior associate judge because the prevailing law at the time for calling a regular grand

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[3] "No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to a district judge, or senior district judge that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury." Act of March 3, 1911, ch. 231, § 284, 36 Stat. 1165.

See also, *United States* v. *Perlstein*, 39 F. Supp. 965, 971 (D.N.J. 1941); 4 Barron, Federal Practice and Procedure § 1891 (note); and Orfield, the Federal Grand Jury, 22 F.R.D. 343, 364. The contrary view expressed in *Morris* v. *United States*, 128 F.2d 912, 916 (5th Cir. 1942) seems clearly in error in retrospect.

[4] 62 Cong. Rec. 5932 (1922) (Mr. Nelson); H.R. Rep. No. 943, 67th Cong., 2d Sess. 1 (1922).

[5] 62 Cong. Rec. 6998-7001 (1922) (various).

[6] See, e.g., 62 Cong. Rec. 5932 (1922) (Mr. Nelson).

jury vested the power in a "district judge or senior district judge." [7] This latter provision was obviously to distinguish between single and multi-judge district courts. There is, further, no doubt that Section 1408 was intended to be a permanent law which would permit special grand juries to be summoned when needed in the future.[8]

From 1922 until 1946, then, it can be said with hindsight that the law relating to summoning regular or special grand juries in the District of Columbia was clear. Then, in 1946, the Federal Rules of Criminal Procedure became effective. Rule 6(a) empowered the "court" to order one or more grand juries. Since each judge on a multi-judge court has equal power and authority with all others, see, e.g., *Tanner Motor Livery, Ltd.* v. *Avis, Inc.*, 316 F.2d 804 (9th Cir. 1963), unless otherwise provided, presumably Rule 6(a) contemplated that any judge on a district court could summon an additional grand jury upon a proper showing.[9]

The statutory authority for the Federal Rules expressly provided that "all laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 18 U.S.C. § 3771 (Supp. V, 1963). Therefore, it would seem that the emergence of Rule 6(a) would have repealed Section 1408 under both § 3771 and general principles of law [10] *had the issue been raised.* Sec-

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[7] Act of March 3, 1911, supra note 3.

[8] The Senate passed the bill as an independent measure prepared by the Attorney General. The House, and eventually Congress, made it a part of the District of Columbia Code to insure its permanence. 62 Cong. Rec. 1011 (1922).

[9] Extremely persuasive evidence that Congress intended Rule 6(a) to permit any judge to summon a grand jury rests in the fact that in 1937, in an act "to permit grand-jury extensions to be ordered by *any* district judge," Congress deleted the words "or senior district judge" from the 1911 Act, supra, note 3. Act of August 24, 1937, ch. 746, 50 Stat. 748.

[10] A later statute of general application in federal courts throughout the country supersedes a prior, conflicting act of only local application. See, *Jordan* v. *United States*, 93 U.S. App. D.C. 65, 297 F.2d 28 (1953); and recent approval in *Broden* v. *Bowles*, 35 F.R.D. 13 (D.D.C. 1964).

tion 1408 and Rule 6(a) still could have been read together as they were not patently inconsistent. But since both contemplated the identical problem, i.e., summoning additional grand juries in a particular way, and since one purpose of the Federal Rules was to provide uniformity in the federal courts,[11] the most reasonable inference and construction would seem to have been that Rule 6(a) superseded Section 1408 of the local Code. Thus, it appears that between 1946 and 1964, any judge on the district court could have summoned an additional grand jury upon a proper showing, and Judge Tamm would have acted pursuant to the law in these circumstances. Indeed, this court will take judicial notice of the fact that since the adoption of Rule 6(a), it has been the settled practice and custom of both the court and the District Attorney's office to proceed as if Rule 6(a) were the law. Accordingly, requests for additional grand juries, along with certain other procedural matters, have rather consistently been presented to the judge designated by the chief judge to preside over criminal division number one. Such, at least, has been my personal experience over the past thirteen years on this bench. But this case involves an additional grand jury called under Rule 6(a) in April, 1964. Account, therefore, must be taken of the revision of Title 11 of the District of Columbia Code which became effective on January 1, 1964. As stated previously, new Section 2306 of that title revised and codified old Section 1408. Although there is nothing in the legislative history of the revision to indicate that Congress was cognizant of this potential conflict, that history does suggest a definite intention to retain the additional grand jury provision in 2306(a) as the law in the District. Most salient evidence of this intention, of course, is the mere existence of this precise and unambiguous statute in the new Code. The Court is obliged to presume that Congress intended the local grand jury section to have some force and effect, either over and above, or in conso-

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[11] E.g., *Carper* v. *United States*, 116 F. Supp. 817 (D.D.C. 1953).

nance with, Federal Rule 6(a). Additional evidence of an intention to give vitality to the local grand jury provision is gleaned from the stated purpose and actual process of the revision itself. Both the House and the Senate committees which considered the bill expressly stated that they were revising, codifying and enacting the parts of the Code involved. They further explained that:

> Revision, as distinguished from simple codification, means the substitution of plain language for awkward terms, *reconciliation of conflicting laws, omission of obsolete, superseded or repealed sections*, and consolidation of similar provisions.[12]

Thus, Section 2306(a) remains in the Code in spite of a clear purpose to weed out conflicting, obsolete and superseded provisions. The committee reports also contained tables of sections omitted from the revision because repealed or for other reasons. A frequent explanation for omission was that the particular section was superseded by a subsequent Federal Rule of Procedure. Especially significant was the express repeal of old Section 1406 [1408 is here in issue] because the subject matter, term of service of a grand jury, was covered by Federal Rules of Criminal Procedure 6(c) and (d) [Rule 6(a) is here in issue].[13] This background cannot be ignored. While the Court has doubts that Congress, in the interest of uniformity if no other, would have re-

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[12] H.R. Rep. No. 377, 88th Cong., 1st Sess. 2 (1963); S. Rep. No. 743, 88th Cong., 1st Sess. 4 (1963) (emphasis added). The reports further stated that there was no intention to change substantive law. But this statement is of little weight here. Contrary to the way the Court now indicates it may have held had the issue of conflict been presented prior to 1964, in fact, the issue has never been judicially determined. Congress may well have, indeed must be presumed to have, believed it was not changing substantive law. The Court cannot now say, with the force of law, that Section 1408 was in fact implicitly repealed by Rule 6(a), and therefore Section 2306 is a change in substantive law not intended by Congress which may be repudiated.

[13] See Table 5 of the appendix in the reports cited in the preceding note.

tained Section 1408 in the revision had the potential problem been expressly and thoroughly considered, that belief does not grant the Court license to disregard federal legislation.[14] Therefore, the Court reluctantly concludes that Section 2306(a) must be acknowledged as the law in the District at this time. As such, it must be construed either together with Rule 6(a), or, if there is irreconcilable conflict, Section 2306(a) must prevail since it is more specific, of local application, and most importantly, later in time.[15]

It is this Court's opinion that the two provisions can be read together harmoniously. Both Rule 6(a) and Section 2306 confer authority on the court to summon additional grand juries. Duplication is not inconsistency. Rule 6(a) speaks, in express terms, only of the power of a court to call grand juries. On the other hand, Section 2306 speaks of a similar power, but in addition, it specifies who on the District Court for the District of Columbia must exercise that power. The latter section is not a limitation of Rule 6(a) in substance, for additional grand juries may be called here to the same extent as elsewhere. Accordingly, whether an additional grand jury is requested under the authority of Rule 6(a) or Section 2306, only the "chief judge, or in his absence . . . the presiding

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[14] The process of ascertaining a sometimes fictional congressional purpose in order to deal with the inevitable problems of conflicting legislation may often produce undesirable results in a system of jurisprudence which strives for some degree of certainty. The instant case may be illustrative. Unless congressional attention is expressly directed to the problem, the law in the District providing for additional grand juries may soon again be uncertain. The Federal Rules of Criminal Procedure are now in the process of revision. When the new Rule 6(a) or its equivalent becomes effective, the question decided today may well be reborn.

[15] The government suggests a third alternative construction which the Court must reject. It is argued that the two provisions confer separate and distinct, equally valid authority on the court to enlist a special grand jury. While his approach has appeal as an easy solution to the problem, it in effect erases newly enacted Section 2306(a) from the books, since contrary to its express terms, any judge could call a special grand jury under Rule 6(a).

judge" may actually exercise the authority. In reaching these conclusions, the Court is guided by the settled principles of construction to give effect, as far as possible, to every word of a statute, and "to save and not to destroy." [16]

The final consideration is the government's contention that even reading the provisions as has been done, Judge Tamm's action was still lawful because he, by designation of the chief judge, was "presiding" for purposes of Section 2306(a), even though the chief judge was physically present. This temptation to play with words must also be rejected. "Absence" has a clear meaning in our language and cannot, in the Court's opinion, be reasonably stretched to encompass physical presence coupled with a delegation of power. Furthermore, even assuming the absence of the chief judge, it is very doubtful that the judge sitting in criminal division number one in this case would be a "presiding judge" within the meaning of Section 2306(a).[17]

It necessarily follows that the special grand jury which returned the indictment in the instant case was not summoned according to the statutory mandate, but was illegally constituted and the resulting indictment was a nullity. The right to a lawful grand jury flows directly from the Constitution [18] and, in the opinion of the Court, violation of the right in these circumstances is prejudicial *per se*.[19]

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[16] *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) and cases cited therein.

[17] See note 1 supra, and accompanying text.

[18] U. S. Const. amend. V begins: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *."

[19] The government has not addressed itself to the issue of prejudice, presumably because dismissal of the indictment is the sole way to vindicate this improper procedure and to give meaning to the statute. Prejudice in the ordinary sense need not be shown, *Clark* v. *United States*, 19 App. D.C. 295 (1902); *Underwood* v. *United States*, Crim. No. 72587 D.D.C., November 1, 1943; see also *United*

In summary, newly enacted Section 2306 of Title 11 of the District of Columbia Code can only reasonably be read as a refinement or definition of the power to summon an additional grand jury contained both therein and in Rule 6(a). Since the chief judge was holding court on the dates here pertinent, only he could exercise that power. For the foregoing reasons, the indictment is therefore dismissed. In view of this holding, the other motions made by defendants are hereby dismissed as moot.

IT IS SO ORDERED by the Court this 30th day of October, 1964.

/s/ Luther W. Youngdahl
Judge

States v. *Carper*, 116 F. Supp. 817 (D.D.C. 1953), because, as the Supreme Court has stated:

> Inasmuch as the initiation of prosecution through grand juries forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matters of first importance. *United States* v. *Johnson*, 319 U.S. 503, 507 (1943).

It must be added, however, that since other factors may be involved were this issue to arise after a conviction, this opinion is strictly limited to the instant case where the issued was raised before trial.

[Filed November 30, 1964]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Criminal No. 784-64

UNITED STATES OF AMERICA

vs.

WALLACE AND TIERNAN INCORPORATED, ET AL.

NOTICE OF APPEAL

Name and address of appellant United States of America

Name and address of appellant's attorney

United States Attorney
United States Courthouse

Offense

Concise statement of judgment or order, giving date, and any sentence

Memorandum and order of this Court entered on the 30th day of October, 1964.

Name of institution where now confined, if not on bail

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the above-stated Memorandum and Order.

United States of America
Appellant

/s/ David C. Acheson
Attorney for Appellant.

Date: November 30, 1964

Copy to:

Frederick B. Lacey, Esq.
815 K Street, N.W.
Washington, D. C.

Nicholas J. Chase
1216 Wyatt Building
Washington, D. C. 20005

[Filed December 30, 1964]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 784-64

UNITED STATES OF AMERICA

v.

WALLACE AND TIERNAN, INCORPORATED

ORDER

On oral motion of the United States Attorney and pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, it is hereby

ORDERED that the time to file the record on appeal and docket the proceedings in the above-captioned case in the Court of Appeals be extended to and including February 18, 1965.

/s/ Alexander Holtzoff
Judge

Dated: December 30, 1964

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order has been mailed to counsel for plaintiff, Frederick B. Lacey, Esquire, 815 H Street, N.W., Washington, D.C., 20001, this 30th day of December, 1964.

/s/ Frank Q. Nebeker
FRANK Q. NEBEKER
Assistant United States
Attorney

[Filed January 29, 1965]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 784-64

UNITED STATES OF AMERICA, PLAINTIFF

v.

WALLACE & TIERNAN, INC., ET AL., DEFENDANTS

ORDER

On oral motion of the United States for inclusion of certain matter in the record, and it appearing to the Court that certain matter of record relevant to the summoning of the grand jury which returned the indictment herein are relevant to the appeal taken by the United States, it is this 29th day of January, 1965,

ORDERED that the clerk is directed to file in the record herein the following official records of the court:

1. A true copy of the letter dated April 29, 1964, from the United States Attorney to Judge Tamm requesting the summoning of an additional grand jury.
2. True copies of the orders of Judge Tamm dated April 29 and May 1, 1964, summoning the grand jury.
3. A true copy of the memorandum by a deputy clerk of receipt of Judge Tamm's Order of April 26, 1964, reflecting receipt thereof and necessity to summon a special venire.
4. A true copy of the certificate of empaneling dated May 19, 1964—

and it is further

ORDERED that upon filing of the foregoing matter in the record herein the entire record shall be transmitted to the United States Court of Appeals as the record on appeal herein. See Rules 75(g) and (h), F. R. Cv. P.

/s/ Luther W. Youngdahl
Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order has been mailed to attorneys for defendants, Frederick B. Lacey, Esq., and Harry T. Carter, Jr., Esq., 815 H Street, N.W., Washington, D. C. 20001, and Nicholas J. Chase, Esq., and Barnum L. Colton, Jr., Esq., 1216 Wyatt Building Washington, D. C. 20005, this 29th day of January, 1965.

/s/ Frank Q. Nebeker
FRANK Q. NEBEKER
Assistant United States Attorney

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 763001 581

BRIEF FOR APPELLEES WALLACE & TIERNAN INC.
& CHARLES E. HOUGH

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,154

UNITED STATES OF AMERICA, *Appellant*

v.

WALLACE & TIERNAN INC., ROBERT T. CONNER,
CHARLES E. HOUGH, *Appellees*

Appeal from the United States District Court for the District of Columbia

Of Counsel:

FREDERICK B. LACEY

HARRY TYSON CARTER
JEROME K. KUYKENDALL
1815 H Street, Northwest
Washington 6, D. C.
Attorneys for Appellees
Wallace & Tiernan Inc.
and Charles E. Hough

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

QUESTION PRESENTED

Is not an indictment invalid where returned by a special grand jury which was not ordered by the Chief Judge, a 1963 statute having provided that in the United States District Court for the District of Columbia the ordering of additional grand juries shall be in the discretion of the Chief Judge, and the Federal Rules of Criminal Procedure being silent on the procedures to be followed in ordering grand juries authorized to be summoned by Rule 6(a) thereof?

INDEX

CITATIONS

• Cases chiefly relied upon are marked by asterisks.

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* Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,154

UNITED STATES OF AMERICA, *Appellant*

v.

WALLACE & TIERNAN INC., ROBERT T. CONNER, CHARLES E. HOUGH, *Appellees*

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES WALLACE & TIERNAN INC. & CHARLES E. HOUGH

SUMMARY OF ARGUMENT

In 1946 when the Federal Rules of Criminal Procedure took effect, Rule 6(a) superseded Section 421 of Title 28 of the United States Code (1940 Ed.) as the authority for the summoning of grand juries by United States district courts. The Congress recognized this by the specific repeal of Section 421 in the 1948 recodification of Titles 18 and 28 of the United States Code.

The Federal Rules are silent as to the procedure to be followed by the various district courts in ordering the summoning of grand juries, but in the District of Columbia at all relevant times the procedure to order the summons of so-called "special" or "additional" grand juries has been specified by statute. At the time of the adoption of the Federal Rules this procedure was set forth in Sec. 11-1408 of the D. C. Code (1940 Ed.). In the 1948 recodification of Titles 18 and 28 of the United States Code, Congress recognized the inconsistency with the Federal Rules of dozens of sections of Title 11 of the District of Columbia Code and specifically repealed these sections. However, since Sec. 11-1408 contained procedures not otherwise covered by the Federal Rules, Congress left this section undisturbed in 1948, and, in 1963, after substantially amending the section, Congress re-enacted it as Sec. 11-2306 of the D. C. Code.

The law was well-established in the District of Columbia that the precise and positive requirements of former Sec. 11-1408 had to be strictly observed. Since the 1963 amendments thereto did not affect the thrust of the statute, the requirements of present Sec. 11-2306 must also be strictly observed. And since the challenge sustained below goes to the very existence as a legal instrumentality of the grand jury returning the indictment in question, violation of the statute is prejudicial *per se*.

Even if the court should consider former Sec. 11-1408 of the D. C. Code to have been in conflict with Rule 6(a) and superseded thereby, the enactment in 1963 by the Congress of present Sec. 11-2306 required the United States District Court for the District of Columbia to amend the procedures it had been following and conform them to the new statute.

It cannot reasonably be contended that Congressional enactment of the pertinent part of Sec. 11-2306 was an inadvertence, since the provisions of former Sec. 11-1408

were in one regard substantially amended, and since Congress recognized and acted upon an expression of alarm by the D. C. Bar Association that the draft prepared by the contract revisers threatened to put the summoning of an additional grand jury in the control of the United States Attorney rather than in the discretion of the Chief Judge where historically it had always been in the District of Columbia.

Accordingly, the action of the court below in dismissing the tainted indictments was correct.

ARGUMENT

I. THERE BEING NOTHING INCONSISTENT BETWEEN F.R. CRIM. P. 6(a) AND SEC. 11-2306 OF THE D. C. CODE, BOTH MUST BE GIVEN EFFECT AND IT FOLLOWS THAT THE INDICTMENTS ARE INVALID.

A. Rule 6(a) and Sec. 11-2306 Are Not Inconsistent.

Examination of both Rule 6(a) of the Federal Rules of Criminal Procedure and Sec. 11-2306 of the D. C. Code (Supp. III, 1964) led the court below to conclude that the two provisions can be read together harmoniously.

Patently this is so, for the pertinent sentence of Rule 6(a) reads simply as follows: "The court shall order one or more grand juries to be summoned at such times as the public interest requires." This provision authorizes the various United States District Courts to summon such grand juries as are required at times dictated by the public interest. As such, it is the replacement for a much amended statute, P.L. 110, 61st Cong., 2d Sess., 36 Stat. 267, which first authorized the summoning of more than one Federal grand jury per term per division in any Federal judicial district. Congress recognized this in the 1948 recodification of Title 18 of the United States Code, entitled "Crimes and Criminal Procedure," by repealing 28 U.S.C. 421, the amended version of P.L. 110, 61st Cong.,

2d Sess. (P.L. 772, 80th Cong., 2d Sess., 62 Stat. 864 *et seq.*)

However, unlike the prior statute, the rules are totally silent on the procedure for ordering grand juries to be summoned, so under Rule 57(b)[1] the various District Courts may implement this procedure "in any lawful manner not inconsistent with these rules or any applicable statute."

Sec. 11-2306 of the D. C. Code is not in conflict with the authorization given by Rule 6(a) to the United States District Court for the District of Columbia to order the summoning of grand juries. Sec. 11-2306 pre-supposes that the District Court for the District of Columbia in any manner not inconsistent with the rules will order a grand jury to be summoned if the public interest requires. But Sec. 11-2306 does circumscribe the manner in which the District Court for the District of Columbia may order an additional grand jury summoned.

Sec. 11-2306, in pertinent part reads:

> If the United States attorney for the District of Columbia certifies in writing to the chief judge of the District Court, or in his absence, to the presiding judge, that the exigencies of the public service require it, the judge may, in his discretion, order an additional grand jury summoned, which shall be drawn at such time as he designates. Unless sooner discharged by order of the chief judge, or, in his absence, the presiding judge, the additional grand jury shall serve until the end of the term in and for which it is drawn.

Clearly this section does not limit the authority of the United States District Court for the District of Columbia to order the summoning of as many grand juries as the

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[1] "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." Rule 57(b), Federal Rules of Criminal Procedure.

public interest requires. But just as clearly, this section does set forth the procedure to be followed in the District of Columbia in the ordering of *additional* grand juries. Since Rule 6(a) does not even purport to prescribe procedures, there is no conflict between that rule and Sec. 11-2306. Where the conflict lies, of course, is between Sec. 11-2306 and the procedure followed by the United States District Court for the District of Columbia in the case at bar. In this conflict there can be no doubt that the procedure must give way to the statute. Indeed Rule 57(b) specifically so provides.

As this court stated in *Simon* v. *Simon*, 58 App. D.C. 158, 161, 26 F.2d 530: ". . . whether (provisions of the D.C. Code) be wise or unwise, they must be respected and given effect by the court until such time as they are modified, amended, or repealed by Congress."

B. The Requirements of Sec. 11-2306 of the D. C. Code Must Be Strictly Observed.

Appellant argues at length that even if the position stated above be conceded, and Sec. 11-2306 can be construed in harmony with Rule 6(a), the statutory provisions are directory and not mandatory and can be violated with impunity. This assertion is untenable.

The detailed legislative history of Sec. 11-2306 will be found in the opinion of the court below, but for the purpose of determining whether the provision is directory or mandatory the section in pertinent part is identical with Sec. 11-1408, D. C. Code (1940 ed.). In *United States* v. *James B. Underwood*, Criminal No. 72587, November 1, 1943, the then Chief Judge of the court below held that the precise and positive directive of Sec. 11-1408 had to be strictly observed, and dismissed indictments returned by a grand jury not summoned in accordance therewith. The Government appealed this decision to this court (Appeal No. 8644) and subsequently the appeal was dis-

missed by the Government's own motion. Since this court clearly has supervisory responsibility over the procedures of the court below, it is to be presumed that the confession of error implicit in the Government's motion was concurred in by this court in granting the motion.

It is axiomatic that if an earlier statute is construed to be mandatory, and a later statute readopts the terms of the earlier statute, the new statute will be construed to be mandatory also. 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 5805, pp. 81-2 (3d ed Horack 1943). Thus whether Sec. 11-2306 be considered directory or mandatory would seem already to have been decided.

However, should this court wish to consider this question *de novo*, appellant's brief would appear largely wide of of the mark.

The excerpt quoted at pages 11-12 of appellant's brief from *French* v. *Edwards*, 80 U.S. 506, related to the conduct of a sheriff in proceedings against real estate for the recovery of delinquent taxes. And, in fact, the court therein construed the statute to be mandatory.

The case principally relied upon by appellant is *United States* v. *Malone*, 18 F. Supp. 865 (N.D. Ill. 1937). In this case the statute construed related to the authority of Federal judges with respect to grand juries. The question before the court was whether under the applicable statute the judge of a multi-judge district who had lawfully empaneled a grand jury could lawfully extend the term of the grand jury, or whether the power to order such an *extension* was restricted to the senior judge. Following a detailed discussion of the entire legislative history of the sections of the Judicial Code relating to the ordering of grand juries, Judge Wilkerson concluded that ". . . the power to order regular (sic) grand juries was one of the powers granted generally to District Judges." *Id.* at 867. It followed to the judge that "The impaneling and super-

vision of the work of the grand jury is a part of the business of the court for the handling of which as a matter of convenience the judges make arrangements among themselves. But as to the power to make orders with reference to the work of the *regular* grand jury, each judge at all times has all the power possessed by the court." *Id.* at 868-69 (Emphasis supplied).

However, the judge carefully distinguished in his opinion between this general power with respect to *regular* grand juries and the carefully circumscribed powers with respect to orders relative to a second grand jury in districts (limited at the time of his opinion) in which such a jury could be summoned and in which there was more than one judge. Indeed, the thrust of this opinion is clearly to the effect that if the question had been raised with respect to a special grand jury, the decision would have been precisely the opposite.

Reuben v. *United States,* 86 F.2d 464 (7th Cir. 1936), *cert. denied,* 300 U.S. 671, adds nothing to *United States* v. *Malone, supra,* and the other cases cited by appellant to show that former 28 U.S.C. 421 was considered directory rather than mandatory do not, in fact, so hold.

Breese v. *United States,* 203 Fed. 824 (4th Cir. 1913), merely held that an indictment of an October-term grand jury would not be quashed for the lack of an October-term order directing the issue of *venire facias* when there had been an order at the end of the April term requiring the clerk and jury commissioner to draw jurors for service at the October term.

In *Nolan* v. *United States,* 163 F. 2d (8th Cir. 1947), *cert. denied,* 333 U.S. 846, a motion had been made to vacate a criminal conviction on the grounds that the judge had failed to *sign* the order that a venire issue for the grand jury which returned the indictment. Denial of this motion

was affirmed for a multiplicity of reasons, the fundamental one being that there was, in fact, no doubt that the order was made by a judge, the court noting in passing that the statute did not even require that the order be in writing much less signed.

In *Morris* v. *United States*, 128 F. 2d 912 (5th Cir. 1942), *cert. denied*, 317 U.S. 661, the issue was whether in a district composed of divisions there could be only one grand jury summoned to inquire into offenses for the *entire* district. In New Jersey this question had already been answered in the negative (*United States* v. *Pearlstein*, 39 F. Supp. 965 (D.N.J. 1941)), and the court so held in *Morris*. However, by way of dictum the court went on to challenge the conclusion of Judge Maris' opinion in *Pearlstein* that—absent special statutory authority—district courts had authority to summon only one grand jury *at a single place of holding court*. It was in connection with this gratuitous attack upon Judge Maris that the court gave its opinion that 28 U.S.C. 421 was "only directory", and, as the court below noted, the commentators generally hold with *Pearlstein* rather than *Morris*. (A. 38)

As the learned court below pointed out in its memorandum opinion, one of the settled principles of statutory construction is "to give effect, as far as possible, to every word of a statute. and 'to save and not to destroy.' " (A. 43, footnote omitted.)

To give any meaning to Sec. 11-2306 of the D. C. Code, it is submitted, special grand juries in the District of Columbia must be ordered summoned by the Chief Judge, or in his absence the presiding judge. To validate the action of any other judge, i.e. to hold this section merely directory, would be to deprive Sec. 11-2306 of any effect.

C. The Grand Jury Having Been Illegally Constituted the Resulting Indictments Are Legal Nullities and No Harm or Prejudice Need Be Shown.[2]

Appellees readily concede that certain irregularities in the selection of grand jurors and operations of grand juries do not invalidate indictments returned by such grand juries in the absence of showing harm or prejudice. But where the very existence of the grand jury is in question, the presence or absence of harm or prejudice is completely irrelevant. Appellant's own cases demonstrate this proposition conclusively.

Appellant suggests at page 11 of its brief that, in the absence of proven harm, to dismiss the indictments herein would, in Justice Frankfurther's words, "make of the grand jury a pawn in a technical game . . . ." *United States* v. *Johnson*, 319 U.S. 503, 512 (1943).

In the *Johnson* case the Court of Appeals for the Seventh Circuit had reversed a conviction on the ground that the order extending the term of the grand jury which had returned the indictment had been fatally defective. Justice Frankfurter for the Supreme Court read the extension order more restrictively so as to sustain the order and the indictment. Without discussing harm or prejudice he *conceded* that otherwise the indictment must fall. (". . . upon (the order's) legality depends the validity of the indictment thereafter returned by the grand jury." *Id.* at 508.) If a defective order *extending* the term of a properly summoned grand jury is fatal to all subsequent indictments without a showing of prejudice or harm, *a fortiori* this is true in the case of a defective order *summoning* the grand jury.

Thus, in *United States* v. *Parker*, 103 F. 2d 857 (3d Cir. 1939), *cert. denied*, 307 U.S. 642, also cited by appel-

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[2] Absence of harm and prejudice is not by this argument conceded by appellees.

lant, the court held that absent an allegation of prejudice, a plea in abatement of an indictment on the ground that the grand jury had not properly been drawn was properly denied "insofar as it was based on this ground." *Id.* at 859. But, significantly, even absent an allegation of prejudice the court went on to consider other grounds of the plea, including one that the term of the grand jury had expired before the indictment had been returned.

Even the court in *Morris* v. *United States, supra,* while apparently falling into error on non-existent issues, properly recognized that without regard to prejudice or injury ". . . a complaint which, as here, challenges the very existence of the grand jury as a legal organization, must be given consideration . . . ." *Id.* at 914.

None of the decisions of this circuit cited by appellant or otherwise known to counsel for appellees are in conflict with this principle that a challenge to the very existence of a grand jury must be determined without regard to harm or prejudice. This principle was acted upon by the court below both in the case here on appeal, and in *United States* v. *Underwood. et al., supra. United States* v. *Carper, et al,* 116 F. Supp. 818 (D.D.C. 1953) is in accord.

II. EVEN IF THERE BE A CONFLICT BETWEEN RULE 6(a) AND SEC. 11-2306, THE LATTER MUST PREVAIL AND THE INDICTMENTS ARE INVALID.

Appellant contends that former Sec. 11-1408 of the D. C. Code (1961 ed.) was superseded[2] by Rule 6, and that the 1963 revision and recodification of Title 11 of the D. C. Code (P. L. 88-241, 77 Stat. 478 *et seq.*) was not intended to change the substantive law in effect immediately prior thereto.

Appellant does not specify wherein Sec. 11-1408 was in conflict with Rule 6, but for the purposes of this argument

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[2] So stated at pp. 5 and 10 of appellant's brief. At p. 8 thereof appellant contends that Sec. 11-1408 was "repealed" by the Federal Rules of Criminal Procedure.

appellees shall assume that when Rule 6 became effective in 1946, even in the District of Columbia the United States District Court could have lawfully adopted procedures allowing any judge thereof to issue an order summoning special grand juries.[4]

This assumption *arguendo* does not, however, answer the question as to what procedures the court below could follow in ordering the summoning of special grand juries after Congerss positively revived former Sec. 11-1408 by re-enacting it in 1963, in amended form, as new Sec. 11-2306 of the D. C. Code. It is submitted, however, that one thing is abundantly clear, i.e. that it is not enough to answer this question to rely—as does appellant—upon the rule of statutory construction "that no intent to change the law shall be *inferred* from a comprehensive re-enactment of a code even where there have been minor changes in phraseology." (Brief for Appellant, p. 9; emphasis supplied.)

The court is not here presented with either the opportunity or challenge of "inferring" legislative intent. By the 1963 codification of Title 11 Congress *did* change the law with regard to the subject covered by former Sec. 11-1408 and its intention to do so is apparent on the face of the statute and was made explicit in the pertinent committee reports in both the House of Representatives and the Senate.[5]

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[4] An interesting question—which need not be decided herein—is what effect the enactment of the 1948 Federal Judicial Code (P.L. 773, 80th Cong., 2d Sess., 62 Stat. 869 *et seq.*) had upon the validity of such procedures. Apparently the question was not ever raised, but the fact that the 1948 Judicial Code specifically repealed a large number of provisions of Title 11 of the D. C. Code considered to be in conflict with the Federal Rules, and not only did not repeal Sec. 11-1408, but actually amended it, would seem to give rise to the inference—contrary to appellant's contention herein—that Congress never intended Rule 6 to supersede either former Sec. 11-1408 or present Sec. 11-2306 of the D. C. Code.

[5] H. Rep. No. 377, 88th Cong., 1st Sess., p. A52; S. Rep. No. 743, 88th Cong., 1st Sess., p. 60.

In Sec. 11-1408, the judge who in the absence of the Chief Judge was to consider the question of summoning special grand juries was the "senior associate judge." But under new Sec. 11-2306, this question, in the absence of the Chief Judge, is to be determined by the "presiding judge." It can thus be seen that Sec. 11-2306 changed the law dramatically,[6] i. e. under the circumstances of *United States* v. *Underwood, supra,* the indictments would henceforth be valid.[7]

The presumption relied upon by appellant as to "inferences" of legislative intent is too frail to support the proposition that where there is express legislative intent to change the law by one part of a sentence, no inference can be drawn as to the intent of enactment of the sentence as a whole.

Appellees submit that the court and the law will be better served by applying to the question at issue the fundamental canons of statutory construction, rather than by pursuing that will-o'-the-wisp legislative intent through the medium of the absence of inferences. The question is essentially a simple one, even assuming that as of the effective date of Rule 6(a), the provisions of former Sec. 11-1408 were superseded:

> 1. Prior to Rule 6(a), general legislation (28 U.S.C. 421) provided that in any district where second grand juries were allowed, any judge of a multi-judge Federal district could order the summoning of second grand juries, just as they could summon what is commonly known as the regular grand jury.

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[6] On January 1, 1964, the senior associate judge of the court below was Judge Pine. However, had the Chief Judge been absent and had the court met that day, Judge Keech would have been the presiding judge.

[7] There was no question in *Underwood* that on the day in question Chief Judge Eicher was absent, nor that Judge Morris (who issued the order to summon a jury) was the "presiding judge." The problem was that Judge Bailey was the "senior associate judge."

2. Despite this general provision, in the District of Columbia by virtue of special legislation (Sec. 11-1408 of the D. C. Code) the authority was limited to the Chief Judge, or, in his absence, the senior associate judge.[8]

3. In 1946 (it is our assumption here) general legislation in form of Rule 6(a) superseded the special legislation of Sec. 11-1408.

4. In 1963 special legislation (P.L. 88-241. 77 Stat. 507) was enacted amending and reviving former Sec. 11-1408 with its requirement that the order summoning additional grand juries be issues by the Chief Judge or a statutorily designated alternate in the absence of the Chief Judge.

Reduced to its essentials, and accepting *arguendo* appellant's assumption that Rule 6(a) superseded Sec. 11-1408, our problem of statutory construction is the simple one of the effect of later special legislation on earlier general legislation.

In Section 11-2306 we are considering a statute which (1) is clear and unambiguous on its face, (2) specifically relates to the District of Columbia, and (3) was enacted subsequent to the promulgation of Rule 6(a). *Sutherland* states: "The most common rule of statutory interpretation is the rule that a statute clear and unambiguous on its face need not and cannot be interpreted by a court . . . ." 2 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 4502, p. 316 (3d ed. Horack (1943). A canon of construction of equal dignity is that where there is a general stat-

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[8] This "peculiarity" is not as peculiar as it may seem at first blush. The very act (P. L. 348, 75th Cong., 1st Sess., 50 Stat. 748) which removed the senior judge criteria generally with regard to second grand juries, *retained* the senior judge criteria with regard to the summoning of third grand juries in the southern district of New York.

ute applicable to all localities within its jurisdictional scope and a later statute adopted for a specific locality, the later local statute prevails as an *exception* to the terms of the general statute. (See SUTHERLAND, *op. cit. supra,* Section 2022 and 5204). And, of course, it is not a canon of construction, but a "rule of law" that a later statute prevails over an earlier statute. By all these basic standards the summoning of the grand jury here in question must be held to the requirements of Sec. 11-2306. To hold otherwise would be to deprive of any meaning whatsoever the deliberate legislative acts of substantially amending and re-enacting former Sec. 11-1408 of the D. C. Code.

If the court should consider that the changes made in former Sec. 11-1408 prior to re-enacting it as Sec. 11-2306, which changes were discussed above, are insufficient evidence of Congressional deliberation, the court it is submitted, can take judicial notice of a report of the Bar Association of the District of Columbia on the then impending revision of Part II of the D. C. Code requested by and, on August 14, 1959, filed with, the Chief Judge of this court.[9]

This report reveals that certain key words were proposed to be omitted in the revision of Sec. 11-1408, and that the Bar Association felt strongly that these words should be retained. That the House Committee on the Judiciary agreed with the position of the Bar Association rather than the proposal of the revisers under contract to the Committee is shown by the text of H.R. 4157, 88th Cong., 1st Sess. And that the Congress agreed with the position of the House Committee on the Judiciary is shown by the retention of these key words in Sec. 11-2306 as enacted.

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[9] It is believed that the records of this court record the fact that this report was also filed with the Committee on the Judiciary of the U. S. House of Representatives and the U. S. Senate.

The full statement of the Bar Association report with respect to Sec. 11-2306 is as follows:

> In the last paragraph of sub-paragraph (a) of this section there is omitted the words "in his discretion" found in Code section 11-1408, the provision being revised. They should be reinserted. For it appears important that the summoning of an additional grand jury is in the lap of the Chief or presiding Judge of the District Court, rather than in the control of the United States Attorney. This is one instance in the revision where it seems the meaning of the word "may" should be made crystal clear. For in many places in the revision it undoubtedly has the effect of "shall."

Appellant's position that, in effect, the retention of former Sec. 11-1408 in the codification of 1963 was an oversight, is thoroughly untenable in the light of legislative history showing unusual attention to this very provision.[10]

Even more implausible is appellant's contention that "it is not presently possible to ascertain what grand juries are original and what are additional within the meaning of § 2306." (Brief for Appellant, p. 9.) The letter of the United States Attorney requesting that an order be issued summoning the grand jury here in question shows on its face that this is not a call for a regular grand jury. (A. 20) And the indictment itself identifies the grand jury as the "*Special* May 1964 Grand Jury Sworn in on May 19, 1964." (Emphasis supplied.)

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[10] Appellant's reference to P.L. 88-139; 77 Stat. 248, which among other things abolished "formal" terms of court is an attempt to raise a completely spurious issue. Both the report of the House Committee on the Judiciary and of the Senate Committee on the Judiciary make absolutely clear that the abolition of "formal" terms of court did not make any change in the substantive law as it already existed. H. Rep. No. 96, 88th Cong., 1st Sess., p. 2. S. Rep. No. 574, 88th Cong., 1st Sess., p. 2.

The court below accepted this declaration at face value and did not trouble to amend its Rule 2(a) until January 16, 1964, some months after P.L. 88-139 was enacted, and after both the enactment and effective date of the recodification of Title 11 of the D. C. Code.

CONCLUSION

For the reasons stated, the Court should affirm the order of the court below dismissing the indictment and dismissing as moot other motions of the defendants.

Respectfully submitted,

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